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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITIZENS FOR RESPONSIBLE GROWTH et al., Plaintiffs and Appellants, v. CITY OF BAKERSFIELD, Defendant and Respondent; J. STANLEY ANTONGIOVANNI et al., as Trustees, etc., Real Parties in Interest and Respondents.	F059202 (Super. Ct. No. S-1500-CV-264869) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman, II, Judge.

M. R. Wolfe & Associates, John H. Farrow for Plaintiffs and Appellants.

Virginia Gennaro, City Attorney; Hogan Guiney Dick, Michael M. Hogan, for Defendant and Respondent.

Cox, Castle & Nicholson, Sarah E. Owsowitz and Catrina L. Fobian, for Real Parties in Interest and Respondents.

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Petitioners Citizens for Responsible Growth, an unincorporated association, and Santos Luevano, an individual,[1] appeal from the denial of their petition for writ of mandate, which seeks to force respondent City of Bakersfield (city) to comply with certain provisions of the California Environmental Quality Act (CEQA), Public Resources Code section 21000 et. seq. The association is seeking to stop construction of a 137,609-square-foot shopping center in southwest Bakersfield, at the corner of Panama Lane and Ashe Road, whose primary tenant would be an 88,988-square-foot WinCo discount grocery store (project).

The association challenges on a number of grounds the adequacy of the Environmental Impact Report (EIR) prepared for the project as an informational document. It also contends that the city's decision to approve the project is not supported by substantial evidence because the traffic mitigation measures adopted by the city, payment of fees into a local and regional traffic impact fund, do not guarantee that the needed improvements to the traffic infrastructure will be built. Finally, the association claims the project's approval is unlawful because, in light of the project, the city's general plan is internally inconsistent in violation of the California State Planning and Zoning Law, Government Code sections 65000 et. seq.

We disagree with these contentions and affirm.

PROCEDURAL HISTORY

In August 2008, the association filed its petition for writ of mandate in Kern County Superior Court. The petition sought to overturn the July 30, 2008, action of the

[1]Although there are two distinct petitioners, the association and the individual, their interests and arguments are the same for purposes of the appeal. In an effort to make the opinion easier to read, we will refer to both petitioners as the "association" and use the term in the singular.

Bakersfield City Council (council) certifying the EIR and approving a general plan amendment, zone change, and preliminary development plan for the project.

The petition alleged, among other things, that the mitigation measures identified in the EIR and adopted by the city to address future traffic impacts of the project are insufficient under CEQA because payment of an impact fee alone is not a firm commitment to build the specified needed infrastructure improvements (additional lanes, traffic flow changes, and traffic signals). The association also claimed the EIR was insufficient because it failed to address a shortfall in funding identified in the regional transportation plan, misrepresented the severity of the traffic impacts, misrepresented the status of the funding for the needed mitigation facilities, and failed to provide information regarding the status of the mitigated facilities. The petition also alleged that the project is inconsistent with the city's general plan.

After consideration of the administrative record, evidence, and argument of the parties, the trial court denied the petition for writ of mandate. The trial court found the following:

1. the city had proceeded as required by law;

2. the city's decisions were supported by substantial evidence;

3. any errors in the CEQA process were nonprejudicial;

4. the city reasonably found the project to be consistent with its general plan;

5. the project did not cause an internal inconsistency in the general plan or a noncorrelation between the circulation and land-use elements of the general plan;

6. the city had provided good faith, reasoned responses to the association's comments on the draft EIR; and,

7. substantial evidence demonstrates the EIR traffic mitigation measures were adopted in compliance with CEQA.

The trial court's final order was reduced to judgment and filed on September 4, 2009.

FACTUAL SUMMARY

The project

The project started when the owners, Real Parties in Interest, J. Stanley Antongiovanni and Linda R. McKenna, trustees of The John M. Antongiovanni Trust (trust), requested a general plan amendment and zoning change for its property at the corner of Panama Lane and Ashe Road in Bakersfield. If approved, the zoning would change the property's designation from its historical agricultural use to low-density residential use in order to accommodate a planned 310-lot subdivision to be built in several phases. This original change covered 77.6 acres and was approved in September 2006. While the prior request was pending, the developer requested a second general plan amendment and zoning change seeking to have 18.7 acres of the property changed from low-density residential to retail commercial. The application for the change stated that there was no specific plan at the time. Later, however, the trust unveiled its plan for a shopping center and identified the anchor store as WinCo, a large discount grocery chain. The project proposal was initially processed through the City of Bakersfield Planning Commission (planning commission).

A traffic study was ordered and prepared. The study describes the project site as "an area of mixed resource, residential, industrial, commercial and public facility land uses." It notes that "[m]any agricultural areas within the project vicinity are transitioning to residential and commercial land uses" and that the city was then "currently processing [general plan amendment/zone change] applications for numerous residential, commercial and/or light industrial developments in the southwest Bakersfield area." The report explained that the center was designed to be a neighborhood shopping center with 60 to 80 percent of its sales coming from the surrounding neighborhood's day-to-day shopping.

After review of the project proposal and the accompanying reports and studies, the planning commission staff recommended approval of the project with the issuance of a

mitigated negative declaration, finding that the traffic impacts could be mitigated by the identified measures and the project as mitigated would have no significant impact on the environment. After a public comment period, the matter went to the planning commission in March 2007 and was approved as recommended by staff. The planning commission found that the requirements of CEQA had been met; that, as mitigated, the project would have no significant impact on the environment; and that the requested amendments to the general plan and zoning change were justified.

The matter was then referred to council for approval. During the public comment period, the city received opposition to the negative declaration recommendation and a demand for a full EIR in the form of a letter drafted by the law firm of M.R. Wolfe & Associates (Wolfe law firm), on behalf of its clients, identified as Donald Whatley and Jeff Albitre. Traffic and air quality were noted as particular concerns. As a result, the matter was taken off calendar and the council instructed that a full EIR be completed.

Draft EIR

The draft EIR was completed and opened to public comment in January 2008. The traffic analysis in the draft EIR acknowledged significant growth and the number of planned but not yet completed projects, both residential and commercial, in the area. The draft EIR analyzed 17 roadways in the vicinity of the project, including 24 intersections, 16 of which were currently existing, eight signalized and eight not. The draft EIR looked at morning, afternoon, and Saturday peak traffic times. It contained a detailed analysis of each intersection and each roadway and compared the 2008 and the 2030 anticipated traffic levels, with and without the project, at each intersection and on each roadway. It reported that in 2008, with or without the project, two unsignalized intersections would experience an unacceptable level of service (LOS).[2] The city's general plan calls for

[2]LOS is a yardstick standard used to categorize the flow of traffic on highways. For example, an LOS A means there is free flow of traffic with minimal delay to stopped vehicles at signalized intersections. LOS C means there are occasional backups in traffic

traffic to be maintained at LOS C or higher. The draft EIR stated that both these intersections had already been identified as intersections requiring a traffic signal by 2008.[3] With the project, an additional unsignalized intersection would perform at an unacceptable LOS. The additional intersection had also been previously identified by the city as needing a signal by 2008. None of the signalized intersections in the area would show an unacceptable LOS in 2008 with or without the project. One roadway section, Panama Lane between Akers Road and Wible Road, would operate at an unacceptable LOS in 2008 with or without the project. In other words, the immediate impact of the project on traffic would be insignificant.

Projecting out into the future, however, the draft EIR reported that, by the year 2030, the project, along with the other planned development for the area, would result in significant traffic congestion. In 2030, with or without the project, 14 of 16 unsignalized intersections will drop to an LOS of F. All eight signalized intersections will "fail," meaning they will drop to an unacceptable LOS. When all of the planned projects in the area are built out and the expected growth becomes reality, the traffic impact of the area's growth will be significant.

In recognition of these likely impacts, the draft EIR identifies multiple needed improvements to traffic infrastructure, which, if built, would bring each impacted intersection or roadway to LOS C or higher, with a few exceptions. If the identified traffic improvements are made between now and 2030, the traffic impacts to this area from the project and other growth will not reduce traffic LOS to unacceptable levels under the general plan—the negative impacts will be successfully mitigated. The exact

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but they are short term and tolerable. LOS E means intersections operate at or near capacity with long delays on all approaching roadways.

[3]Although the writ hearing was held in August 2008, there is no evidence in the record that the signals had been installed as of that date.

timing of each identified improvement is not specified in the draft EIR, other than to state that the improvements must be completed before either the 2008 (for those few identified immediate problems) or 2030 date (for the bulk of the needed mitigation measures). The mechanism by which the draft EIR anticipates construction will take place is a requirement, as a condition of the project's approval, that the developer pay the project's pro rata share of the needed infrastructure into a local and a regional traffic impact fund. These funds would then be used by the city to finance the construction of the infrastructure as it becomes needed.

In addition to the mitigation measures identified, the draft EIR identified four signalized intersections in the vicinity of the project (Gosford Road/Panama Lane, Ashe Road/Panama Lane, Stine Road/Panama Lane, and Wible Road/Panama Lane), which could not feasibly be mitigated to LOS C or better by 2030 when the significant impacts of the project would be felt. According to the draft EIR, the improvements needed to bring these four intersections to LOS C or better would require not only construction but obtaining rights of way on property owned and already developed, including approximately 23 homes and several businesses. The cost of obtaining rights of way would be approximately $36 to $40 million. For this reason, and because the timing of the construction of other needed improvements cannot be guaranteed, the draft EIR concluded that the cumulative impacts on traffic and transportation by this project would be significant and unavoidable by the year 2030 and recommended, in addition to the mitigated measures identified, the adoption of a statement of overriding interest.

The draft EIR also discusses the governing traffic mitigation programs. It describes two separate plans or programs: the Regional Transportation Plan (regional plan) and the Local Impact Fee Program (local program). The regional plan is the long-term 20-year general plan for the Kern County region and is administered by the Kern Council of Governments (Kern COG), of which the city participates. It has two components, the Regional Transportation Improvement Program, referred to in the record

as "RTIP," and the Congestion Management Program. The Regional Transportation Improvement Program is the short-term implementation tool or planning document for the transportation goals set in the regional plan and is adopted annually. It lists transportation projects proposed for implementation within a five-year period. The projects are categorized according to the transportation system they apply to and could include state highways, local highways/expressways, or local streets and roads. Transportation projects on the list are "described in detail, with funding allocated by source and fiscal year." Projects are not built until they successfully move through the planning and funding process, which is managed by the Kern COG. None of the identified mitigation measures for this project appear in the 2007 regional plan document.

The Congestion Management Program is designed to monitor and identify regional networks and works at keeping existing traffic levels on the regional network at LOS E or better. None of the existing areas identified as problem areas in the Congestion Management Program are within the project area.

In addition, the draft EIR explains that the city has its own local program. It too has two components, a regional facilities list and local mitigation fee projects. According to the draft EIR, the improvements on the regional facilities list are typically associated with collector streets, but may also include local streets. The funding for these two types of projects comes primarily from fees assessed to developers to fund "roadway projects that will relieve congestion attributable to growth." The approval and funding process for the regional facilities list involves a five-year planning cycle based on traffic monitoring and study. The city uses traffic data to determine when a project must be placed on the regional facilities list, referred to in the record as "RTIF." When growth results in a significant traffic impact and a projected drop in LOS, projects are placed on the facilities list and funded for construction. The city's Department of Public Works oversees the management of this list and its ensuing projects. "In this way, improvements are constructed before the LOS goes below the City's performance standards to ensure that

significant impacts are avoided." The majority of the mitigation measures identified in the draft EIR are designated as being projects funded by placement on the city's regional facilities list at some point in the future when the LOS is forecasted to drop below LOS C.

Final EIR

During the public comment period, the city received several comments and challenges to the draft EIR from the Wolfe law firm on behalf of Whatley and Albitre that were similar to those raised in this appeal. The letter specifically asked for clarification about the funding source of the proposed mitigation measures and asked that the city identify all project-specific impacts deemed unavoidable. The comments and questions were referred to the planning commission staff for response and preparation of the final EIR.

The final EIR was submitted in March 2008. It included responses to all comments received during the public comment period and answered questions about why traffic impacts could not be fully mitigated. It explained the draft EIR's conclusion that the identified negative traffic impacts were significant and unavoidable because mitigation of the four signalized intersections previously identified was not economically feasible and the remaining intersections might temporarily fall below acceptable LOS due to "the timing of implementation." The document explained that, "[w]hile the payment of local fair share and regional transportation fees are required upon final site plan approval, the City determines the timing of implementation based on growth within the individual areas." The project would still be required to pay the mitigated impact fees into the local and regional funds, and the city would use the fees to construct the projects on its regional facilities list "as it deems necessary in future years to mitigate cumulative growth impacts as they occur [throughout the city]." The final EIR concluded, "[i]t would be speculative to determine the exact timing of the improvements and growth." It also explained that many of the needed improvements would be required even without

the project because of anticipated growth in the area. The project "would only result in a fraction of the future cumulative impacts on the facilities within the study area." It explained that timing could not currently be accurately determined because, "[i]f either the projected growth or impacts of [planned] future projects is not realized, then the cumulative impacts identified in the Draft EIR would be lessened …."

As a result of the inability to identify specifically which and when improvements would be needed to mitigate fully the traffic impacts of the project, and the inability to mitigate fully the cumulative traffic impacts on the four identified intersections, the final EIR found that "[s]pecific economic, legal, social, technological, or other considerations make infeasible the full range of mitigation measures identified in the [final EIR]." The planning commission recommended certification of the final EIR and the matter was set for consideration by the city council.

Council's decision

The project first appeared on the May 7, 2008, council agenda. It was continued to May 21, 2008. On the eve of the hearing, the Wolfe law firm sent a 37-page letter dated May 19, 2008, challenging the project. This time, the law firm identified its clients as Santos and Hermina Luevano, Whatley, Albitre, and the association. The letter raised a number of objections to the draft EIR and final EIR's, claiming the city had provided inadequate responses to concerns raised in previous communications from the Wolfe law firm. The objections relevant to the appeal are these:

1. The traffic study is flawed because it (a) does not project the project-related trips properly; (b) fails to evaluate actual opening-day conditions; (c) omits intersections from the study area that may be impacted; (d) fails to evaluate impacts at State Route 99 and Panama Lane; (e) fails to propose all feasible mitigation at Ashe Road and Panama Lane; (f) fails to evaluate traffic control at access points; and (g) improperly treats payment of impact fees as adequate mitigation without any evidence that payment of fees would actually result in construction or necessary improvements.

2. There is no substantial evidence that impact fees will actually mitigate impacts because the EIR fails to comply with the municipal code requirement that projects requiring a general plan amendment independently calculate traffic impact fees, and there is substantial evidence there will be a significant ($500 million) shortfall in funding for the local streets and roads projects.

3. Because there are unmitigated traffic impacts that will violate express general plan policies, the project is inconsistent with the general plan and cannot legally be approved. Further, the project's approval "implicates and aggravates the failure of the Circulation Element of the General Plan to correlate with and support land use designations." Years of piecemeal development and general plan amendments have rendered the general plan out of date.

Attached to the letter was a report from a traffic engineer (Wolfe traffic report) that critiques the traffic study prepared as part of the environmental impact review. The Wolfe traffic report makes the following contentions specifically relevant to the appeal:

> "Until all of the improvements required to meet LOS 'C' standards are actually in place, the traffic impacts of the proposed project must be considered as *significant and unmitigated*. However, before reaching the conclusion that these impacts are unavoidable, all feasible mitigation must be considered. To ensure and demonstrate the effectiveness of the proposed mitigation for significant impacts, the City must include a mitigation monitoring program that clearly identifies financing, scheduling, implementation responsibilities, and lead agency monitoring for the proposed project."

Staff prepared a response to the May 19 letter, addressing each comment. Supporting documents were provided. In summary, the staff, in consultation with the city's traffic engineer, concluded that the traffic study used in the EIR was accurate and included all feasible mitigation measures. Staff also noted that the traffic impact mitigation, particularly the payment of traffic impact fees, complied with the city's municipal code. The staff reiterated that the city's traffic impact fee program is designed

so that the city can increase and apply funding for road improvements *as road improvements become needed* based on actual growth and traffic counts and explained again how the mechanism worked.

> "The fair share fees that are identified as mitigation for those road segments and intersections that are to be improved to LOS C will be funded at the time the project proceeds. The City will collect those fees for the project's mitigation at the time of the commencement of the project. The City will schedule these and all other improvements based on the City's ongoing comprehensive analysis of road improvement requirements and that the project related mitigations should be put into effect by the year 2030. These roadway improvements are considered 'constrained' which means that these improvements will be reasonably funded through 2030.…
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> "It should be noted that the City's Transportation Impact Fee Program is a current and ongoing program. The projects are funded in three ways 1) through the Regional fee program which is non-discriminatory, 2) through local fair-share development fees charged to developers as projects are implemented, and 3) through off-site improvements actually accomplished by developers during project construction.
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> "Projects involving General Plan amendments are evaluated by adding traffic to the projected 20-year traffic to determine if the RTIF improvements could accommodate the project involving the General Plan amendment. If not, improvements required beyond those identified within the RTIF would be categorized as Local Mitigation and would be covered by the Local Mitigation Impact Fee Program. The Impact Fee is imposed on new development through the application of the Transportation Impact Fee Ordinance and collected at the building permit stage for any development that produces additional vehicular trips over that attributed to the land being developed before the new development is in place. The City of Bakersfield has also established a Local Mitigation Impact Fee Program for traffic improvements that are not listed on the Regional Transportation Impact Fee Project Facilities List. These improvements are not typically associated with collector streets but may also be associated with local streets. Furthermore, if an improvement is required for a specific project, and it was beyond what was contemplated with the RTIF Program, then the improvement is required as a Local Mitigation requirement.
>
> "The construction of new facilities has been accomplished in the City of Bakersfield on an ongoing basis as development proceeds. Exhibit VI shows all of the road improvements accomplished through fair-share fees

> and developer improvements within recent years. This is substantial evidence that the payment of fees is resulting in the construction of actual road improvements. As a result of its continual monitoring of the local circulation system, the City ensures that RTIF and non-RTIF improvements are constructed prior to when the LOS deteriorates below the City's established performance criteria."

The staff also explained that the proposed project is consistent with the general plan and circulation element because the traffic impacts of the project are mitigated to the extent feasible, and remaining impacts are subject to the fee mitigation plan. The project's impact fees help provide funding to address the other significant impacts. In addition, the staff observed that, even though the general plan is undergoing an update, the update does not invalidate the current general plan.

After a public hearing in which no one appeared in opposition to the project, the council voted to certify the final EIR, made findings of fact as recommended by the staff, and found that the project, even with the identified mitigation measures, would result in significant unavoidable impacts to transportation and traffic. The council found that mitigating the traffic impacts to reduce the proposed project's impacts to less than substantial or avoid them altogether was infeasible. The council concluded that the benefits offered by the project far outweigh the unavoidable adverse environmental effects of the project as follows:

1. "The proposed project provides new development which captures the economic demands generated by the marketplace and augments Bakersfield's established role as the capitol of the southern San Joaquin Valley."

2. "The proposed project provides new development which is compatible with and [compliments] existing land uses."

3. "The proposed project provides new development which channels land uses in a phased, orderly manner and is coordinated with the provision of infrastructure and public improvements."

4. "The project provides for a [centrally located] commercial center that will serve the existing and the expected residential developments in the southern Bakersfield area. This central location will serve the local community and reduce impacts associated with more extended travel to commercial businesses …."

5. "The project is consistent with the [Metropolitan Bakersfield General Plan] goals and policies."

The council adopted ordinances certifying the EIR, amending the general plan, and approving the zoning change needed for approval of the project.

DISCUSSION

I. Standard of review

Public Resources Code sections 21168 and 21168.5 provide the standard of review applied by courts in an action challenging an agency decision under CEQA. Under both sections, a court's review of that agency decision is limited to two questions: (1) whether there is any substantial evidence in light of the whole record to support the decision, and (2) whether the agency abused its discretion by failing to proceed in the manner required by law. (Pub. Resources Code,[4] §§ 21168 & 21168.5; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5 (*Laurel Heights*).) In such cases, the court must determine whether the lead agency abused its discretion by failing to proceed in a manner required by law or by making a determination or decision that is not supported by substantial evidence. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390 (*Irritated Residents*); see § 21168.5.)

"A court's proper role in reviewing a challenged EIR is not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information

[4]All further references are to the Public Resources Code unless otherwise noted.

document. [Citation.] Substantial evidence is defined as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.' [Citations.]" (*Irritated Residents, supra,* 107 Cal.App.4th at p. 1391.) "Because an appellate court's task in review of a mandate proceeding is essentially the same as that of the trial court, we review the agency's actions directly and are not bound by the trial court's conclusions. [Citations.]" (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816-817 (*Friends of Lagoon Valley*).)

II. Adequacy of EIR as informational document

We begin with the association's claim that the EIR is inadequate as an informational document because, according to the association, the city failed to respond adequately and in good faith to the association's comments on the draft EIR. Specifically, it claims that the final EIR misrepresented the alleged $500 million funding shortfall; failed to provide the requested information about the status of the mitigated facilities; misrepresented the status of mitigation facilities as "constrained"; and failed to disclose the significance and severity of traffic impacts.

"When assessing the legal sufficiency of an EIR [as an informational document], the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. [Citation.] 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' [Citation.] 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citation.] Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible. When experts in a subject area dispute the conclusions reached by other experts whose studies were used in drafting the EIR, the EIR need only summarize the main points of disagreement and explain the agency's reasons for accepting one set of judgments instead of another. [Citations.]" (*Irritated Residents, supra,* 107 Cal.App.4th

at pp. 1390-1391.) When the informational requirements of CEQA have not been complied with, the agency has failed to proceed in a manner required by law. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220.)

Initially, we observe that the association did not comment on the draft EIR. Its attorney did, but on behalf of two individual clients unrelated to this appeal. It is only in the May 19 letter from the Wolfe law firm that the association is identified as the client on whose behalf the comment is provided. Prior to that date, we found nothing in the record to establish the Wolfe law firm was acting on behalf of the association.

The failure to participate in the public comment period for a draft EIR does not result in a waiver of any claims relating to the sufficiency of the environmental documentation. (*Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1120-1121.) The lead agency, however, is not required to incorporate into the final EIR specific written responses to comments received after close of the public review period. (*City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1043-1044.) Further, a lead agency is not required under CEQA to respond to late comments. (§ 21091, subd. (d)(1); *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1110.) If it chooses to do so, as it did in this case, the lead agency's responses to the late comments cannot be used as a challenge to the sufficiency of the EIR as an informational document so as to make approval of the CEQA project ineffective or contrary to law. To hold otherwise could discourage lead agencies from addressing and considering late comments. (*Gray v. County of Madera, supra,* at p. 1110.)

A challenger to the EIR need only show that it "objected to the approval of the project orally or in writing during the public comment period provided by this division *or prior to the close of the public hearing on the project before the filing of the notice of determination* …." (§ 21177, subd. (b), italics added.) Once this threshold has been met, a petitioner may allege as a ground of noncompliance any objection that was presented by

any person or entity during the administrative proceedings. (*Bakersfield Citizens for Local Control v. City of Bakersfield*, *supra*, 124 Cal.App.4th at p. 1199; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 889-890.) In short, the association has standing to raise its challenges on appeal.

A. Funding shortfall

The association claims the city misrepresented the nature of a funding shortfall referenced in the Kern COG 2007 Regional Transportation Plan report and a memo from City Manager Alan Tandy. Both were provided to the Wolfe law firm during the public comment period. The Kern COG report states that there is currently not enough funding in federal, state, and local budgets to implement the most crucial projects in the region in a timely manner given the significant growth in the region. None of the mitigation measures identified in the EIR are discussed in the report.

The association now claims the shortfall suggests that the mitigating traffic improvements identified in the EIR will not be built or can have no reasonable expectation of being built because the budget constraints facing the region will result in a lack of funds for construction. The city repeatedly has stated that the shortfall identified involves state and federal highway funds needed to finance major highway projects and will not impact the local projects funded by fees collected from developers pursuant to its Regional Transportation Impact Fee Program. The city explained that the association has confused Regional Transportation Impact Facilities, or "RTIF," with Regional Transportation Improvement Program, or "RTIP." It further said that the Regional Transportation Improvement Program is directed toward state and federal funding and that the fair-share mitigations for the project are defined and managed by the city according to its traffic fee assessment ordinance. It stated that the fees collected by the city are used to fund local roadway improvements as cumulative growth impacts occur. The amount collected from developers is adjusted each year to ensure that there is adequate funding to build those facilities needed to maintain an LOS of C or better.

After receiving comments from the Wolfe law firm raising this concern, the city sought a formal response from its traffic consultant, which was provided in a letter dated June 27, 2008. The letter reiterates the city's position that the city's regional transportation impact fee program is funded by developer fees collected in Bakersfield for use in Bakersfield, while the Kern COG regional plan projects are funded by multiple jurisdictions, including the state and federal governments. The impact fee program includes a development fee imposed on new development and contains a Regional Transportation Impact Facilities List and a Transportation Impact Fee Schedule. The facilities list includes many of the improvements needed to maintain an LOS of C or better for new growth or to prevent degradation of existing facilities when there is growth. The fee schedule sets the fees to be collected from the developers. The impact fees are collected and placed in a separate interest-bearing account as required by Government Code section 66000 et. seq.

The letter further explains that:

> "The timing to use the transportation funds is established through the 5-year Capital Improvement Program. This program is overseen by the City's Public Works Department. Periodically (i.e. each year), the City conducts traffic counts, reviews traffic accidents and reviews traffic trends throughout the City. The City uses this data to determine the timing for the improvements listed on the Facilities List and to ensure that needed improvements are constructed prior to that time at which the LOS is forecast to fail to achieve the performance levels established by the City. In this way, improvements are constructed before the LOS goes below the City's performance standards to ensure that significant impacts are avoided. Improvements are identified within each of the 5 years and reviewed periodically to determine if improvements should be shifted into another year based on the traffic counts, accidents, and trends. The Capital Improvement Program establishes a timeframe to fund the improvements as well as design improvements and for the City to hire a contractor to build the improvements.
>
> "The City of Bakersfield has also established a Local Mitigation Impact Fee Program for traffic improvements that are not listed on the Regional Transportation Impact Fee Project Facilities List. These improvements are

> typically associated with collector streets but may also be associated with local streets. Furthermore, if an improvement is required for a specific project, and it was beyond what was contemplated with the RTIF Program, then the improvement is required as a Local Mitigation requirement."

The city has repeatedly stated in its response to public comment that the identified shortfall will have no impact on the city's traffic improvement funds and will not negatively impact the construction of the mitigated traffic improvements in Bakersfield. The association may not agree with the answer the city has provided, however, it is a complete response to the shortfall question. Whether it is sufficient to provide substantial evidence to support the city's conclusions under CEQA is a question we must still address.

The association has pointed to nothing in the record to contradict the city's explanation. It is true that the draft EIR is not always easy to follow. Given the use of abbreviations and inconsistent use of names for the various programs and lists related to traffic improvement, understanding the interrelationship between the programs and their funding sources can be challenging on first reading. However, the city's explanation of how its mitigation program works and why the Kern COG 2007 regional plan shortfall will not impact the project's mitigation measures is sufficiently clear to satisfy CEQA's mandates. (*Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1039 [when reviewing EIR, test is not whether there is absolute perfection but whether lead agency objectively and in good faith complied with CEQA objective].) There is no evidence of bad faith.

Although an EIR is designed to inform the public in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision, an EIR is not an action document. Its purpose is to inform governmental decision makers and to focus the political process on how an agency's action will affect the environment. (*Dusek v. Redevelopment Agency*, *supra*, 173 Cal.App.3d at p. 1040.) The EIR in this case

substantially meets these purposes by explaining that the shortfall question is related to a separate pot of money and that a regional shortfall will not directly impact construction of the identified mitigation measures.

B. Failure to provide requested information on status of mitigation projects

The association also complains that the city failed to say whether any of the local mitigation projects are included in the current five-year Capital Improvement Program and, if not, what the basis is for concluding that funding would be available in the future. In the course of preparing a final EIR, the lead agency must evaluate and respond, with reasoned analysis, to comments relating to significant environmental issues. (§ 21092.5, subd. (a); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124.)

We again conclude the EIR is adequate for informational purposes. For each cycle, the city determines which improvements on the Regional Traffic Impact Facilities List are needed. Improvements that are determined to be needed are funded and moved to the Capital Improvement Program for construction, which we assume will include seeking and awarding bids and construction planning and approval, etc.

The EIR, with its responses to the public comments, explains that the mitigation measures necessary to maintain traffic at an LOS of C or better in the project's vicinity have been identified in the EIR and will be built as needed through the process set by the city's traffic mitigation program. The city explains that the mitigated measures are not currently on the city's five-year capital improvement list (i.e., already planned and funded) because the mitigated measures are not yet needed and the city works on a five-year cycle. The city cannot forecast exactly when between 2008 and 2030 any one of the traffic mitigation measures identified will be required. The mitigation measures identified in the EIR are for a 20-year period. As did the court in *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140-141 (*Save Our Peninsula*), we find no requirement in CEQA that an EIR must include a time-

specific schedule for the agency to complete specified road improvements. All that is required by CEQA is a *reasonable plan* for mitigation. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1032; see also *Laurel Heights, supra,* 47 Cal.3d at p. 418.)

The city explained the flexible nature of the program. The traffic impacts identified in the EIR for the most part were *projected* impacts—projected because much of the development planned for the vicinity of the project had not yet occurred. The EIR explained that the expected traffic impacts would gradually worsen over the years as development occurred in the area. The project, however, contributed only a small percentage of the total traffic impacts. The city acknowledged that it could not provide accurate times and dates for when traffic impacts at a given intersection or roadway would be adversely impacted enough to require the identified mitigation measure. To a certain extent, the drafting of an EIR involves some degree of forecasting. Consequently, an agency need only use its best efforts to find out and disclose all that it reasonably can to the public. (*Sacramento Old City Assn. v. City Council, supra,* 229 Cal.App.3d at p. 1031; see also *Laurel Heights, supra,* 47 Cal.3d at p. 398 [prophesy not required in EIR].) Given the uncertainty of future growth, the information provided by the city and its explanation of the projected nature of the growth is sufficient to satisfy CEQA.

C. "Constrained" or "unconstrained"

The association contends the city's response to its numerous questions asking for verification of a funding source were false and misleading because the city said at first the projects were constrained, and then admitted they were not yet funded. According to the association, the term "constrained" means programmed and funded. This argument lacks merit because, when reading the EIR as a whole, the city defines the term "constrained" as those projects *reasonably likely to be funded*. Since the city's position is that the mitigation measures identified in the EIR are likely to be funded through the city's traffic impact fee program, we see nothing inconsistent or misleading about the

city's use of the term "constrained" or its explanation of why it believes the identified mitigated measures will be completed before 2030. The city explained that "constrained" as used by the city in the EIR means improvements that "will be reasonably funded through 2030." The city gave the same response earlier in the process, stating that the "constrained project listing contains those projects that are reasonably thought to be reliably funded through the year 2030. The local roadway segments to be upgraded by the mitigation measures may be considered in a constrained list." The city's use of the term has been consistent and has never meant that a mitigation improvement has reached any particular list as fully funded.

D. Significance of temporary traffic impacts

The association's last challenge is that the EIR contains unresolved inconsistencies. It claims that, although the city continued to assert traffic impacts could be fully mitigated, it also admitted that payment of fees did not guarantee the timing or completion of the necessary traffic improvements. Again, we disagree with the association's characterization of the EIR's contents and the city's representations.

The association has extracted various statements from the EIR. When the EIR, however, is read in its entirety and the statements challenged are read in context, the city has identified the traffic infrastructure improvements that must be met before the LOS deteriorates below acceptable levels. In addition, it has identified a reasonable plan for building these improvements by 2030 so that the project's traffic impacts will be fully mitigated except for the four intersections previously discussed. The city has also disclosed in good faith that the inability to predict exactly when traffic improvements are needed to prevent deterioration and to predict with certainty the timeline of a specific construction project, may result in a *temporary* LOS degradation in the identified intersections and roadways during the planning and construction process. This is not "inconsistent" information but a candid acknowledgement that government can be slow and imperfect. Even with a well-designed program in place to assure the mitigation

measures are timely constructed, delays may occur, with or without the project. Even with an annual review to ensure that the fees set are sufficient to fund all needed projects, economic downturns and unexpected budget crises can undermine adequate funding. It is precisely because the city cannot guarantee that the proposed mitigation will prevent all LOS degradation despite its best efforts that the EIR identifies the potential temporary LOS degradation as an unavoidable and significant environmental impact of the project. This type of analysis is exactly what CEQA requires—honest candor, reasonable expectations, and a full discussion of the potential environmental impact of any project undertaken by government. (*Gray v. County of Madera, supra,* 167 Cal.App.4th at p. 1109 [analysis of environmental effects need not be exhaustive, but will be judged based on reasonable feasibility].)

III. Sufficiency of the evidence

Having concluded that the EIR is sufficient as an informational document, we turn to the next issue: Is the city's decision to certify the EIR and go forward with the project supported by substantial evidence? In considering this question, we focus on the association's contention that payment of impact fees is insufficient as a mitigation plan.

The substantial evidence standard is applied to conclusions, findings, and determinations made in the CEQA review process because these involve factual questions. (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259.) Substantial evidence requires enough relevant information and supporting reasonable inferences so that a fair argument can be made to support a particular conclusion, even though other conclusions might also be reached. (*Irritated Residents, supra,* 107 Cal.App.4th at p. 1391.) Argument, speculation, unsubstantiated opinion or narrative, evidence which is inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment, are not substantial evidence. (*Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at p. 1198.)

Section 21002 requires agencies to adopt feasible mitigation measures to lessen substantially or avoid significant adverse environmental impacts. Under the CEQA guidelines, a legally adequate mitigation measure must be capable of, "(a) Avoiding the impact altogether by not taking a certain action or parts of an action. [¶] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. [¶] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. [¶] (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.…" (Cal. Code Regs., tit.14, § 15370.) The city adopted a fee-based mitigation program designed to maintain current traffic LOS by making improvements to traffic infrastructure as the need arises. These types of fee-based infrastructure mitigation programs have been found to be adequate as mitigation measures under CEQA. (See, e.g., *Save Our Peninsula, supra,* 87 Cal.App.4th at pp. 99, 140-141 [upholding traffic impact mitigation program similar to one adopted by Bakersfield]; see also *Russ Building Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 845 [upholding transit impact development fee]; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502 [city adopted mitigation funds for parking and affordable child care as mitigation to downtown development].) The CEQA guidelines also recognize that when an impact is the result of cumulative conditions, the only feasible mitigation may involve adoption of ordinances or other regulations designed to address the cumulative impact and may include requiring the project to fund its fair share of mitigation measures designed to alleviate the cumulative impact of the project. (Cal. Code Regs., tit. 14, § 15130, subd. (c).) We agree and have held before that a commitment to pay fees without any evidence that mitigation actually will occur is inadequate. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729-730.)

In the *City of Hanford* case, the city relied on a mitigation agreement to purchase water where there was no evidence any water was available for purchase. To the

contrary, the opposite was true—there was evidence no water was available. Consequently, the developer's promise to pay into the mitigation fund bore no connection to actual mitigation of impacts. Here, however, there is evidence that the needed improvements will be built. There is evidence of a city ordinance committed to building the needed improvements and providing a mechanism for collecting increased fees when needed. There is also evidence that the city successfully has used its program to build needed traffic improvements in the past.

Chapter 15.84 of the Bakersfield Municipal Code was adopted "to regulate the use and development of land so as to assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide a regional transportation system consistent with the Circulation Element of the Metropolitan Bakersfield General Plan." (Bakersfield Mun. Code, § 15.84.020.) It covers all transportation capital improvements, including construction of new through lanes; construction of new turn lanes; construction of new frontage or access roads; construction and widening of new bridges; construction of new drainage facilities in conjunction with new roadway construction; purchase and installation of traffic signalization (both new and upgrading); construction of curbs, medians, and shoulders in conjunction with new roadway construction; relocating utilities to accommodate new roadway construction; and any other capacity increasing improvements. (Bakersfield Mun. Code, § 15.84.030.) The ordinance also clarifies that the city maintains its own Regional Transportation Facilities List, which includes those projects in the Metropolitan Bakersfield general plan area that are included in the adopted Capital Improvement Plan annually updated by the council. "These facilities constitute some of the regional facilities needed to maintain [an] LOS C or prevent the degradation of roads which are currently below LOS C as shown in the Metropolitan Bakersfield General Plan—Circulation Element." (Bakersfield Mun. Code, § 15.84.030, subd. J.)

The ordinance creates an annual review process during which the city public works director presents to the council a proposed fee schedule, which is adjusted annually according to the annual construction cost index and which is "evaluated to account for changes in the Regional Transportation Facilities List, changes in cost estimates for the various projects on the list, and any other item which would change new [development's] proportionate share of the cost of the Regional Transportation Facilities List." (Bakersfield Mun. Code, § 15.84.040, subd. E.)

The ordinance also restricts the use of the funds collected for "capital improvements to transportation facilities associated with the 'Regional Transportation Facilities List' … made necessary by the new development. No funds shall be used for periodic or routine maintenance. Funds shall be used exclusively for capital improvements within the city or for projects outside the city but within the Bakersfield Metropolitan General Plan area which are a direct benefit to the city." (Bakersfield Mun. Code, § 15.84.070, subd. A.) The ordinance further requires that, each year, the public works director report to the council, identifying the capital improvement plan for road construction projects identified under the plan and that the plan "indicate the approximate location, size, time of availability and estimates of cost for all improvements to be financed with transportation impact fees." (Bakersfield Mun. Code, § 15.84.070, subd. C.) Requiring this type of action reflects a substantial commitment to capital improvements.

We are guided by the decision in *Save Our Peninsula, supra,* 87 Cal.App.4th at page 141, in which the court upheld a similar traffic mitigation fee program in spite of evidence that past projects had not always been built in a timely manner. The court, while not unsympathetic to the complaints of the petitioners that past delays in keeping up with development had resulted in significant traffic impacts, found the challenged mitigation program sufficient under CEQA. In response to a claim that no specific timetable for development meant no guarantee that the mitigated improvements would be

built, it stated that a time schedule for traffic improvement is inherent where an agency's traffic impact program provides for improvements to be constructed as the traffic triggering the need for the improvements exceeds a projected threshold. (*Save Our Peninsula, supra,* at p. 141.)

In this case, as the court did in *Save our Peninsula*, we presume that the city will follow its own ordinances. It will identify needed improvements as they are triggered by growth and will spend the fees collected from new development on appropriate improvements to affected road segments. (See, e.g., *Erven v. Board of Supervisors* (1975) 53 Cal.App.3d 1004, 1012.) If the funding falls short, as the association claims it will here, we presume the city will use the process authorized by its municipal code to raise the fees collected so that funding is available. (Bakersfield Mun. Code, § 15.84.070, subd. A.) The record establishes that the city has done so in the past and that it has the power and intention to do so in the future.

The association also claims that, for those improvements identified as mitigation measures that are not part of the Regional Traffic Impact Fee Facilities List, there is no funded plan to ensure these improvements are actually built. We disagree. The traffic engineer reported that the city has two traffic impact programs, regional and local, and that the city has a "proven track record" of using the two programs to implement needed traffic improvements caused by development. This is evidence that the city has a reasonable plan that works for obtaining funding and for building needed traffic improvements.

All that is required by CEQA is that there is a reasonable plan for mitigation. (*Save Our Peninsula, supra,* 87 Cal.App.4th at p. 141; *Friends of Lagoon Valley, supra,* 154 Cal.App.4th at pp. 817-819.) Uncertainties affecting the implementation of improvements such as those argued by the association do not render a fee-based mitigation plan inadequate. (*City of Marina v. Board of Trustees of California State*

University (2006) 39 Cal.4th 341, 364-365.) We conclude substantial evidence supports the city's adoption of the mitigation measures identified in the EIR.

IV. General plan consistency

The association argues (1) the project is inconsistent with the city's general plan circulation policies requiring LOS C or better; (2) the general plan amendment necessary for the project's approval renders the plan internally inconsistent because the project is likely to degrade traffic circulation below acceptable levels, and developers will not pay their fair share of needed traffic improvements; and (3) the city's contrary findings are not supported by substantial evidence. Specifically, the association argues that the general plan requires that traffic impacts be managed to maintain an LOS of C or better and that approval of the project as mitigated does not do the job. The position is a reframing of the association's earlier challenge to the EIR—there is no commitment to timing and funding for any of the identified mitigation measures required if traffic is to remain at an LOS of C or better.

The relevant general plan policies require that (1) new transportation facilities be built as needed based on existing usage and future demand (policy 33); (2) improvements needed because of new development be made to prevent streets and intersections from degrading below LOS C or below the current level if already below LOS C where physically possible (policy 36); (3) new development and expansion of existing development pay for necessary access improvements as identified in the required traffic impact report (policy 37); and (4) new development and expansion of existing development pay a pro rata share of the costs of improvements in transportation impacts caused by the project (policy 39).

A. Internal consistency

When amending a general plan in order to accommodate new development, the agency must assure that the amendment is consistent with other elements of the general plan. In this case, the project's approval must not impair the circulation standards within

the general plan. (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 100 (*Concerned Citizens*).) Government Code section 65302, subdivision (b)(1), requires that the circulation element of a general plan be closely, systematically, and reciprocally related to the land-use element of the plan. (*Concerned Citizens, supra,* at p. 100.) The statute is designed to ensure that the circulation element describes, discusses, and sets forth standards and proposals respecting any change in demands on the various roadways or transportation facilities of a county as a result of changes in uses of land contemplated by the plan. (*Ibid*.) The intent is in part to prohibit unlimited population growth in its land-use element without providing proposals for how the transportation needs of the increased population will be met in the circulation element. (*Ibid*.)

The association argues that the city cannot amend its general plan in a piecemeal fashion so as to obliterate the policies set by the existing general plan or in a way that makes the current general plan outdated. It points to a number of places in the administrative record where there is evidence the city has outgrown its general plan and is in the process of updating it as proof supporting the association's position. We understand the association's argument, but find little support for it in this record or the law.

There is no question that a general plan must be reviewed and revised as circumstances warrant. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 792; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572.) The city has acknowledged that the unprecedented growth in Bakersfield has resulted in the general plan becoming outdated. It is in the progress of updating its current general plan. However, the association has cited no authority holding that, during the update process, the public entity is without power to make land-use decisions, especially when other requirements of the law are met. This type of restriction would be an extremely drastic remedy for growth exceeding forecasted rate. The term "forecast," after all, means a

prediction, guess, or estimate; it is not a promise or guarantee. (American Heritage College Dict. (3d ed. 2000) p. 532, col. 2.)

A city or county is not always the master of its own growth destiny. Economic conditions outside, as well as inside, a community drive population growth. Other complex factors play a role. (See Thrall, McClanahan & Elshaw-Thrall, *Ninety Years of Urban Growth as Described With GIS: An Historic Geography* (Apr. 1995) Geo Info Systems <http://www.clas.ufl.edu/users/thrall/reprints/stapr95/stapr95.htm> [as of Nov. 2, 2010]; Rappaport, *U.S. Urban Decline and Growth, 1950 to 2000*, Economic Review (3d quarter 2003) <http://www.kc.frb.org/publicat/econrev/PDF/3q03rapp.pdf> [as of Nov. 2, 2010].) The city is required by law to respond and control growth as best it can by careful consideration and policymaking; perfection is not required. (*Friends of Lagoon Valley, supra,* 154 Cal.App.4th at p. 817 [general plan serves as charter for future development and embodies fundamental policy decisions; rigid conformity not required]; *DeVita v. County of Napa, supra,* 9 Cal.4th at pp. 781-782 [amendment of general plan is act of formulating basic land-use policy for which localities have been constitutionally endowed with wide-ranging discretion].)

While a number of amendments have been made to the city's general plan, and the city's staff has acknowledged that, due to phenomenal growth, the current general plan is in need of updating, we find no internal inconsistencies. This case is not like *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378 (*Napa Citizens*), where the court found that the county had stated a policy of reducing traffic congestion, recognizing that an increase in traffic would cause unacceptable congestion, but at the same time, approved a project increasing traffic congestion without taking any affirmative steps to handle that increase. (*Id*. at p. 380.) Here, the city has identified the traffic impacts of the project and other planned development and has taken steps to address the likely traffic congestion within a 22-year period.

Also, the city is moving forward to update its general plan. In the meantime, it has considered amendments to the land-use portion of its general plan as needed. The law allows for general plan amendment when the city deems it necessary to accommodate unplanned or unexpected growth. (Gov. Code, § 65358, subd. (a) & §§ 65351-65356.) During the approval process, the city analyzes how any proposed amendment will impact other elements of the general plan. This analysis includes the circulation element, so that in the process of amendment, care is taken to ensure consistency with the long-term planning decisions, goals, and objectives established when the current general plan was adopted. (See *DeVita v. County of Napa*, *supra*, 9 Cal.4th at p. 773.) This is all that is required.

B. Project's consistency with general plan

A project is consistent with the city's general plan if it will further the objectives and policies of the general plan and not obstruct their attainment. State law does not require perfect conformity between a proposed project and the city's general plan. (*Friends of Lagoon Valley*, *supra*, 154 Cal.App.4th at p. 817.) Consistency means being compatible or in harmony with the objectives, policies, general land uses, and programs specified in the general plan. (Gov. Code, § 66473.5; *Friends of Lagoon Valley*, *supra*, at p. 817.) "General plans ordinarily do not state specific mandates or prohibitions. Rather, they state 'policies,' and set forth 'goals.'" (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) A project need not completely satisfy every policy set out in a general plan, as long as it is compatible with the objectives and goals set out in the general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678.) An agency's decision that a project is consistent with the applicable general plan can be reversed only if the agency acted arbitrarily or without evidentiary foundation. (*Sequoyah Hills Homeowners Assn. v. City of Oakland, supra,* at p. 717.)

As the project is presented in the EIR, there is no internal inconsistency between the city's general plan and the project's approval (the general plan amendment). As we have already discussed, the project EIR identifies the traffic improvements that will be needed in the area as a result of growth and development, including the proposed project. The project as mitigated is consistent with the general plan's circulation element because mitigated traffic will not drop below LOS C (general plan policies 33 & 36), with the exception of four identified intersections and for those temporary times when funding and implementation fall behind growth. The project provides only a small part of traffic impact on these four intersections. For these, the city has made an overwhelming-consideration finding, which the association has not challenged. The city has created and implemented a successful program by which traffic improvements are moved from identified status to funded status to implemented status on an as-needed basis. Although the timing and funding components of implementation may not always perfectly match need, there is sufficient evidence in the record establishing the success of the city's traffic mitigation fee program. It is a program reasonably likely to lead to mitigation of the project's traffic impacts.

The project also requires as a condition of approval that the developer pay it's pro rata share of the traffic improvements by paying into the city's traffic impact fee program. The current fee is set by city ordinance and is updated annually to ensure that the fee rate remain sufficient to fund the improvements as needed. The actual costs of needed improvements at some future date (e.g., 2024), is hard to predict with certainty, but most likely will increase. Economic conditions, inflation, and the strength of the United States dollar are all unknown variables at this time. The city's program, established by municipal code, with its annual review process, is a reasonable way to meet the city's general plan policy and goal that development pay for a fair share of identified needed traffic improvements resulting from a proposed project. (See *Friends of Lagoon Valley, supra,* 154 Cal.App.4th at p. 817 [traffic fee impact program set by

ordinance is reasonable method of obtaining general plan traffic goals]; compare with *Napa Citizens, supra,* 91 Cal.App.4th at p. 380 [merely identifying problem of increased traffic associated with growth not sufficient where there is no binding commitment to do anything to alleviate impact of project on traffic and housing].) The project as mitigated is consistent with policies 37 and 39. Further, the association's challenges to the project on theories related to the general plan fail.

DISPOSITION

The judgment is affirmed. Costs are awarded to respondents.

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Wiseman, J.

WE CONCUR:

_____
Ardaiz, P.J.

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Levy, J.